10592 Contempt and Other Postjudgment Proceedings

10592.1 Contempt Generally; Contempt Instituted by Private Parties; Notice to Parties:

a. Whenever a respondent refuses to comply with either the affirmative, other than backpay, or negative (''cease-and-desist'') provisions of a court judgment (see Compliance Manual secs. 10590.1 and 10590.6), or when the Region concludes that new charges alleging conduct arguably encompassed by the provisions of a court judgment have merit (see Compliance Manual sec. 10590.4), the Region should submit the matter to the Contempt Litigation Branch, with a copy to the Division of Operations Management, with the Region's recommendation whether contempt proceedings should be instituted. For backpay cases and reinstatement issues, see Compliance Manual sections 10527.7, 10590.8, and 10590.9.

   In those situations when the respondent's initial refusal to comply with one or more affirmative provisions is remedied expeditiously and the Region is satisfied that the respondent is complying, the matter need not be submitted to Contempt, unless a meritorious charge has been filed. See Compliance Manual section 10590.3.

b. No court has ever permitted a private party to institute contempt proceedings to compel compliance with a judgment enforcing a Board order.[103] Accordingly, whenever a party to the case indicates that it has filed or intends to file its own contempt proceedings with the court, the Region should immediately notify the Contempt Litigation Branch, with concurrent notification to the Division of Operations Management.

c. Before recommending the institution of contempt proceedings, the Regional Director, at his or her discretion, may notify the respondent of the Region's recommendation, and should normally do so. However, there are clearly some circumstances which make such notice inadvisable. As one example, where there is a substantial risk that the Respondent, if notified of the possibility of contempt proceedings, would dissipate assets, notice should not be given.

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[103] See *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 264–265, 269–270 (1940); *Auto Workers v. Scofield,* 382 U.S. 205, 220–221 (1965).

10592.2 Compliance Developments after Submission of Contempt Recommendation: Any substantial change or progress with respect to compliance following the Region's submission of its recommendation regarding contempt should promptly be reported orally to the Contempt Litigation Branch, and should be confirmed by memorandum to the Contempt Litigation Branch, with a copy to the Division of Operations Management.

Whenever contempt or other ancillary proceedings have been recommended or are pending, and a new charge has been filed against the same respondent or a related party, the Region should act on the charge, if meritorious, in the manner set forth in section 10590.4. In those instances when the Region determines, after investigation, that a charge is not meritorious, the Region should first notify the Contempt Litigation Branch in writing, with a copy to the Division of Operations Management, of its determination and of its reasons therefor before advising the parties of its determination and its intention to dismiss the charge.

10592.3 Criteria Governing Choice Between Contempt or Further Board or Other Proceedings: Each case, of course, should be judged on its own merits. Although no single factor should necessarily be considered conclusive, the Region should evaluate each of them in determining whether to recommend the institution of civil or criminal contempt proceedings. The Region is encouraged to consult informally with the Contempt Branch before formally submitting a case.

a. Whether the alleged violation is covered by the judgment: A Board order, when enforced, is in the nature of an injunction, enforceable by contempt proceedings in the rendering court. Enforced cease-and-desist orders are of indefinite duration. There is no limitations period within which an action for contempt must be brought. A contempt proceeding does not open to reconsideration the validity of the underlying order.

   A narrow (''like or related'') cease-and-desist order will ordinarily encompass any future conduct that violates the subsections of the Act involved in the underlying case.[104] On the other hand, a broad (''in any other manner'') cease-and-desist order may reach all future

[104] *NLRB v. Express Publishing Co.*, 312 U.S. 426, 435 (1941) (''acts which are of the same type or class as unlawful acts which the court has found to have been committed'' may be enjoined); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191–193 (1949). Accord: *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718 (7th Cir. 1987) (judicial order to bargain ''wr[ites] statutory prohibitions into a decree enforceable by contempt'').

violations.[105] In addition, Board orders are generally considered to be limited in geographic scope, at least in the absence of some explicit statement to the contrary. Finally, conduct may fall outside the subsections involved in the underlying case and yet still violate a ''like or related'' order—for example, where an employer attempts to undermine a bargaining order by discharging leading union adherents.[106]

Thus, where there is an outstanding judgment literally covering the alleged violation, a contempt recommendation is prima facie indicated, even though the violation is not identical to, or does not grow out of, the offense or dispute in the underlying case.[107] In considering the alternative courses of action against the respondent, the scope of the issues in the underlying litigation should be broadly construed and the full natural meaning given to the language of the order.[108]

b. Whether the evidence meets the standard of proof for establishing contempt: The evidentiary standard for establishing proof of civil contempt is ''clear and convincing evidence.''[109] This has been described as an ''intermediate standard,'' lying between those of ''mere preponderance'' and ''beyond a reasonable doubt.''[110] The standard in criminal contempt proceedings is proof ''beyond a reasonable doubt.''[111] Thus, the evidentiary burden is heavier in contempt than in administrative proceedings, although the legal standard is the same.[112] In civil contempt, a respondent's good faith or lack of willfulness is not a defense.[113]

c. Whether more extensive remedies, available only in contempt, are deemed necessary to ensure compliance; whether a Board or other available proceeding is apt to be more successful or expeditious than contempt in achieving compliance: when the respondent is a recidivist

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[105] *NLRB v. Express Publishing Co.*, supra at 435.

[106] *NLRB v. Express Publishing Co.*, supra at 437 (''discriminatory discharge of union members may so affect the bargaining process as to establish a violation of [a bargaining] order'').

[107] *Containair Systems Corp. v. NLRB*, 521 F.2d 1166, 1173–1174 (2d Cir. 1975).

[108] *NLRB v. Alterman Transport Lines*, 587 F.2d 212, 215–216 (5th Cir. 1979); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192–193 (1949); *NLRB v. Leslie Metal Arts Co.*, 104 LRRM 3138, 3141 (6th Cir. 1980); *NLRB v. Winn-Dixie Stores*, 353 F.2d 76, 77 (5th Cir. 1965); *NLRB v. Hod Carriers*, 228 F.2d 589, 592 fn. 3 (2d Cir. 1955); *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 449 fn. 32 (D.C. Cir. 1953), cert. denied 346 U.S. 855 (1953).

[109] E.g., *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1183 (1981).

[110] *Addington v. Texas*, 441 U.S. 418, 423–424 (1979).

[111] *Bloom v. Illinois*, 391 U.S. 194, 205 (1968); *Young v. U.S. ex rel. Vuitton*, 481 U.S. 787, 798–799 (1987).

[112] *Oil Workers v. NLRB*, 547 F.2d 575, 585 (D.C. Cir. 1976).

[113] Id. at 581; *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *NLRB v. Trailways*, 729 F.2d 1013, 1017 (5th Cir. 1984).

or has engaged in particularly egregious or widespread misconduct, the ''stronger medicine'' of contempt is prima facie warranted.[114] Prospective noncompliance fines, reimbursement of costs and attorney fees, detailed bargaining, reading and mailing of notices, compensatory damages (if any), and other remedies not available or normally granted in administrative proceedings are generally imposed by the courts in contempt cases.

Conversely, although the refusal of a respondent to furnish payroll records to compute backpay is prima facie contumacious, ultimate satisfaction of the make-whole order normally will be achieved more expeditiously if the Board forgoes contempt and instead either obtains the records by Section 11 subpoena, or issues a compliance specification based on secondary sources respecting employee earnings or the Region's own best approximation. See Compliance Manual section 10621.4.

Finally, contempt will likely be the only recourse when the alleged conduct violates the affirmative, nonmonetary provisions of a decree but not the Act (e.g., notice posting, reinstatement, expungement of files, restoration of status quo ante, execution of contract, etc.), or when the 10(b) period has run without a charge having been filed, inasmuch as the 10(b) limitation applies only to administrative proceedings and not to contempt.[115]

d. Whether compliance with a liquidated backpay judgment can effectively be secured through collection proceedings: Collection proceedings are the preferred means of securing compliance with a liquidated judgment. See Compliance Manual sections 10593.2 and 10590.8(c) regarding circumstances in which contempt proceedings to compel payment may be appropriate, either as an alternative to, or in conjunction with, collection proceedings. Collection proceedings normally will be conducted by the Region, with the advice and assistance of the Contempt Litigation Branch, the Special Litigation Branch, with respect to bankruptcy matters, and other headquarters units, as appropriate.

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[114] *NLRB v. Crown Laundry*, 437 F.2d 290, 294 (5th Cir. 1971). See also *NLRB v. Electrical Workers IBEW Local 3 (Northern Telecom)*, 730 F.2d 870, 881 (2d Cir. 1984) (Board has a statutory duty to seek ''broader and more stringent remedies'' against a repeat offender); *NLRB v. Florida Steel Corp.*, 648 F.2d 233, 240 (5th Cir. 1981); *NLRB v. Operating Engineers Local 825*, 430 F.2d 1225, 1230 (3d Cir. 1970); *Steelworkers (H. K. Porter Co.) v. NLRB*, 363 F.2d 272, 275 (D.C. Cir. 1966) (a ''succession of proceedings resulting in Board orders cast in statutory language is not the answer'' when interference with protected rights persists).

[115] See *Leman v. Krentler-Arnold Co.*, 284 U.S. 448, 452, 454 (1932); *NLRB v. Hopwood Retinning Co.*, 104 F.2d 302, 305 (2d Cir. 1939) (on contempt) (contempt regarded as part of original case, not as an independent proceeding); *NLRB v. Southwestern Colorado Contractors' Assn.*, 447 F.2d 968, 970 (10th Cir. 1971). See also *NLRB v. Schill Steel Products*, 480 F.2d 586, 596 (5th Cir. 1973).

e. Whether a significant issue is peculiarly one for the exercise of the Board's expertise: Courts have been reluctant to resolve, as a de novo matter in contempt proceedings, questions implicating representational issues, inasmuch as they are viewed as concerning an area of special Board expertise.[116] Mere complexity of the law, however, is not a reason to forgo contempt.[117] Nor does the fact that an administrative procedure is available in any way vitiate the Board's power to seek enforcement of a court decree through contempt proceedings.[118] Rather, the Board's decision to invoke the court's contempt power is in itself an exercise of the Board's discretion in light of its expertise in achieving compliance with its orders.[119]

f. Whether the decree has grown too stale to warrant contempt proceedings: Judgments enforcing Board orders are permanent in duration and do not lose their efficacy with age,[120] and sustained compliance does not diminish their vitality.[121] ''Sustained obedience is just what the law expects.''[122] Nevertheless, the age of the decree is to be taken into account and, after a long period of quiescence, a new violation may warrant administrative proceedings rather than contempt, especially if the misconduct is isolated or not egregious. The fact that a judgment is more than a few years old and has not been disobeyed will not, however, by itself preclude resort to contempt proceedings.

g. Whether immediate 10(j) or 10(l) relief is needed; concurrent administrative and contempt proceedings: In situations when immediate 10(j) or 10(l) relief is warranted, concurrent contempt proceedings may

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[116] *Computer Sciences Corp. v. NLRB*, 677 F.2d 804, 808 (11th Cir. 1982); *NLRB v. FMG Industries*, 820 F.2d 289 (9th Cir. 1987); *Aquabrom Div. of Great Lakes v. NLRB*, 746 F.2d 334 (6th Cir. 1984); compare *NLRB v. Laborers*, 882 F.2d 949, 953 (5th Cir. 1989).

[117] *NLRB v. Teamsters Local 282*, 428 F.2d 994, 1000–1001 (2d Cir. 1970).

[118] *NLRB v. Teamsters Local 282*, 72 LRRM 2098, 2113 (1969) (report of Special Master), approved 428 F.2d 994 (2d Cir. 1970); *NLRB v. John S. Swift & Co.*, 302 F.2d 342, 345 (7th Cir. 1962); *NLRB v. Schill Steel Products*, 480 F.2d 586, 595–596 (5th Cir. 1973); *NLRB v. C.C.C. Associates*, 306 F.2d 534, 539 (2d Cir. 1962).

[119] *Auto Workers v. Scofield*, 382 U.S. 205, 221 (1965); *NLRB v. Kohler Co.*, 351 F.2d 798, 806 fn. 10 (D.C. Cir. 1965); *NLRB v. Union National de Trabajadores*, 611 F.2d 926, 933 (1st Cir. 1979).

[120] *NLRB v. Reed & Prince Mfg. Co.*, 196 F.2d 755, 761 (1st Cir. 1952) (11 years); *U.S. v. Swift & Co.*, 189 F.Supp. 885 (N.D.Ill. 1960), affd. 367 U.S. 909 (1961); *Wirtz v. Credit Bureau of South Florida*, 51 CCH L.C. ¶ 31,658 (S.D.Fla. 1964). Vacatur of a permanent injunction is not warranted unless '''the danger which the decree sought to prevent ha[d] been ''attenuated to a shadow.''' *Teamsters Local 249 v. Western Pennsylvania Motor Carriers Assn.*, 660 F.2d 76, 84 (3d Cir. 1981), and unless absent such relief, ''extreme'' and ''unexpected'' hardship would result. *Delaware Valley Citizens Council v. Comm. of Pennsylvania*, 674 F.2d 976, 982 (3d Cir. 1982). Accord: *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803 (8th Cir. 1969), cert. denied 395 U.S. 905 (per Blackmum, J.).

[121] *SEC v. Thermodynamics*, 319 F.Supp. 1380, 1383 (D.Colo. 1970), affd. 464 F.2d 457 (10th Cir. 1972), cert. denied 410 U.S. 927 (1973).

[122] *Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957).

not be appropriate because some courts do not favor duplicative litigation.[123] However, there may be cogent reasons for proceeding both administratively and in contempt in a given case, for example, when the facts are identical but the remedial relief sought may differ. Thus, 8(a)(1) conduct may be alleged as violative in the contempt petition while the same conduct is proven to show animus in support of an allegation of an 8(a)(3) discharge in a concurrent administrative proceeding, either because the outstanding decree does not prohibit 8(a)(3) conduct, or the allegation is not supported by clear and convincing evidence.

10592.4 Regional Office Submissions Regarding Contempt: Regional Recommendations to Washington concerning contempt should be prepared as thoroughly as feasible, and should contain the following:

a. A recommendation by the Regional Director, accompanied by an investigative report of the compliance officer or other investigating agent;

b. The complete investigative file or a copy;

c. A copy of the judgment or judgments alleged to be violated, together with a summary of the litigation history of the respondent (previous contempt adjudications, judgments, unenforced Board orders, formal and informal settlements, and non-Board adjustments);

d. When contempt is recommended, particularly for failure to comply with affirmative provisions, documentary or testimonial (affidavit or deposition) evidence sufficient to constitute prima facie proof of the violation;

e. A statement of any defenses raised by the respondent, or otherwise anticipated from the circumstances of the case, with the Region's analysis, including a statement of its reasons for believing the asserted defenses are without merit, and any supporting citations;

f. A recital of all efforts made to achieve compliance or to obtain information respecting the status of compliance, if unknown; and

g. A statement concerning the existence and status of any related legal proceedings.

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[123] See *NLRB v. Murray Ohio Mfg. Co.*, 60 LRRM 2267 (6th Cir. 1965).

10592.5 Notice to Parties of Board Authorization to Institute Contempt Proceedings: On receipt of the Board's authorization to institute contempt proceedings, the Contempt Branch will normally notify the parties in writing.

If contempt proceedings are not authorized, the Region will be notified, either telephonically or in writing, and the Region, if it previously has notified the charging party and the respondent that it was recommending contempt, should notify them of the decision not to proceed in contempt. If the charging party requests a written statement of the reasons for the decision not to seek contempt, the request, which should also be in writing, should be forwarded immediately to the Contempt Litigation Branch for reply. The charging party should be notified that a copy of a summary statement or detailed explanation, whichever is requested, setting forth the reasons, will also be provided to the respondent and the other parties to the proceeding.

10592.6 Documentation of Expenses of Investigating Contempt Allegations and Processing Contempt Proceedings: Courts routinely require respondents who have been adjudged in civil contempt to reimburse the Board for its costs and expenses, including attorneys' fees and other personnel costs, incurred by the Region, as well as Washington Headquarters staff.[124] When the court awards costs to the Board, the Board, through the Contempt Litigation Branch, must (unless the amount is agreed on) prepare and submit to the court a verified statement of such costs so that the court may fix the amount of the award. If the respondent contests the Board's claim, the matter may be referred to a special master for hearing.[125] Accordingly, in all cases in which contempt has been recommended or is anticipated, the Region should maintain detailed, contemporaneous time records reflecting work performed in the ''investigation, preparation, presentation and final disposition'' of the contempt proceedings.[126] The records should reflect the case name and number; Board agent name; description of work performed;[127] date work was performed; and hours or fractional hours spent performing each specific task.[128] Such time

[124] *Dallas General Drivers Local 745 (Farmers Co-operative) v. NLRB*, 500 F.2d 768, 771–772 (D.C. Cir. 1974); *NLRB v. Operating Engineers Local 825*, 430 F.2d 1225, 1229 (3d Cir. 1970), cert. denied 401 U.S. 976 (1971).

[125] *NLRB v. Teamsters Local 85*, 103 LRRM 2795 (9th Cir. 1970).

[126] *NLRB v. Trailways*, 729 F.2d 1013, 1024 (5th Cir. 1984).

[127] *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); *Crowe v. Lucas*, 479 F.Supp. 1258, 1260 (N.D.Miss. 1979) (fee reduced when timesheets gave insufficiently precise description of work done); *National Assn. of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (casual, after-the-fact estimates of time expended on a case are insufficient to support an award of attorney fees).

[128] For example, ''drafted letter dated _____ to Respondent's Counsel _____ requesting compliance,'' or ''visited respondent's facility to check posting of remedial notice.''

records should be maintained separately for each case by attorneys, field examiners, clerical employees, and other compliance personnel performing work on the case. Copying and other costs should similarly be recorded, and copies of travel vouchers showing travel expenses related to contempt proceedings should be retained in the case file for future use in supporting the Board's application for an award of costs.

10592.7 Regional Assistance to Contempt Litigation Branch: The Regions are expected to render all requested assistance to the Contempt Litigation Branch in preparing for and prosecuting any contempt case authorized by the Board. As time is often of the essence in these matters, the Region should respond promptly to requests for assistance and additional investigation.

10592.8 Notice to Successors of Potential Contempt Liability: To avoid potential problems of proof of knowledge of unremedied contumacious conduct in a *Golden State* successorship situation, whenever it appears that a third party may acquire the business of a respondent at a time when contempt proceedings may be appropriate, the Region should serve the purchaser with written notice of its potential liability as a successor or otherwise, accompanied by a copy of the relevant orders and judgments. See Compliance Manual section 10594.3 and the sample letter in Appendix 5. Any unusual circumstances or problems that would militate against such notice should be directed to the Division of Operations Management, as set forth in section 10594.3(a), prior to a recommendation for contempt proceedings, and to the Contempt Litigation Branch, following such recommendation.

10592.9 Closing Case Involving Contempt Proceedings: The Region should not close a case in which contempt proceedings have been initiated or are under consideration, without first obtaining clearance from the Contempt Litigation Branch.

10593 Procedures in Backpay Collection Cases:

10593.1 Regional Responsibility Generally: In cases where backpay has been liquidated and embodied in a court judgment, the Region shall have primary responsibility for collection. The Contempt Litigation Branch shall be available to render advice and assistance.

The Federal Debt Collection Procedure Act of 1990, PL 101–647, Title XXXVI, 28 U.S.C. § 3001 et seq. (FDCPA), establishes uniform, nationwide

procedures which the United States must follow when it brings collection proceedings on ''debts'' owed to it. This statute replaces the patchwork of state collection procedures that previously governed. Backpay comes within the FDCPA's definition of ''debt'' (28 U.S.C. § 3002(3)). The FDCPA's provisions for postjudgment remedies appear at 28 U.S.C. §§ 3201–3206.

10593.2 Criteria for Instituting Collection Proceedings: Collection proceedings generally are a quicker means than contempt of obtaining satisfaction of a backpay judgment. Accordingly, they are prima facie indicated in all backpay cases when voluntary compliance is not forthcoming, or when the Region and the respondent are unable to reach a settlement. In deciding whether to undertake collection proceedings, the Region should carefully consider the types of postjudgment proceedings available under the FDCPA and the likely impact of such actions on the respondent. Collection proceedings may also be instituted contemporaneously with contempt proceedings when the respondent has also violated nonmonetary provisions of the judgment or when circumstances otherwise warrant. Collection proceedings will not be available when the backpay has not been liquidated in a supplemental judgment. (See Compliance Manual sec. 10592.3(d).)[128] However, in appropriate circumstances, such as when the named respondent(s) or those acting on its behalf or in concert with it have secreted or fraudulently transferred assets, or have created alter egos prior to entry of a backpay judgment, contempt proceedings under the original ''make-whole'' judgment may be warranted. In such circumstances, prejudgment attachment or similar restraints on assets held by previously unnamed parties may be available (see Compliance Manual sec. 10594).

10593.3 Conduct of Collection Proceedings: Collection proceedings generally are to be conducted by the Region. Requests for advice should be directed to the Contempt Litigation Branch or, in bankruptcy matters, to the Special Litigation Branch. When there is a likelihood that collection proceedings could result in substantial cost to the Agency—for example, when an execution could cause the Agency to be responsible for costs of maintaining property—clearance should be sought from Operations-Management.

10593.4 Obtaining Judgment Lien Against Real Property: Ordinarily, the first step in collection should be to immediately obtain a judgment lien under 28 U.S.C. § 3201(a) by filing a certified copy of the

[128] See 46 Am.Jur.2d *Judgments* § 242 (1969); 47 Am.Jur.2d *Judgments* §§ 1053, 1056 (1969); 30 Am.Jur.2d *Executions* § 5 (1967); 49 C.J.S. *Judgments* 458 (1947); Annotation, 55 ALR2d (1957).

abstract of the judgment in the manner provided for filing a tax lien under 26 U.S.C. § 6323(f)(1) and (2). These provisions in essence require that liens be recorded in the manner prescribed under applicable state law. Accordingly, it is important that each Region become conversant with the practice and procedure for recording of liens against real property in each State in which the Region conducts operations. If the respondent files a petition for bankruptcy protection within 90 days after perfection of a judgment lien, the respondent, as debtor in possession or a bankruptcy trustee, will be able to void the lien.

The Region should request the Contempt Litigation Branch to obtain the certified abstract of judgment from the court of appeals. If a certified abstract cannot be obtained directly from the court of appeals, the Region will be so notified and will be instructed to register the judgment with an appropriate district court under 28 U.S.C. § 1963 (see immediately below) and then obtain an abstract of the judgment from the district court.

10593.5 Registration of Judgment in District Court: The purpose of registering a judgment in a district court is to give that court jurisdiction over further proceedings that may need to be undertaken, such as execution or garnishment under the FDCPA or discovery under Fed.R.Civ.P. 69(a). The Federal judgment registration statute (28 U.S.C. § 1963) as amended provides that a judgment ''returned in favor of the United States may be so registered at any time after the judgment is entered.'' Registration of backpay judgments should therefore be effected, absent compliance, by filing a certified copy of the judgment in the U.S. district court for the district in which the respondent resides or transacts business.[129] The Contempt Branch will provide the Region with a certified copy of the judgment to enable the Region to register the judgment in the district court.

If a district court clerk refuses to register a backpay judgment, the Region should notify the Contempt Litigation Branch, which will advise regarding the appropriate action and will, if necessary, seek an order directing registration of the judgment.

10593.6 Postregistration Procedures: When the district court clerk registers the judgment, it will be assigned a docket number, probably on the court's ''miscellaneous docket'' and, pursuant to 28 U.S.C. § 1963,

[129] It will be necessary to register the judgment in only one district because the FDCPA's nationwide service of process provision, 28 U.S.C. § 3004(b), permits process of the court in which the collection action is commenced to be served ''in any State.'' Similarly, under Fed.R.Civ.P. 45(a)(2) (applicable through Fed.R.Civ.P. 69(a)), a subpoena compelling production of documents from, or attendance at a deposition by, a nonparty shall issue from the court for the district in which the production or deposition is to take place.

''shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.'' The Region should then proceed to take one or more of the steps outlined below, in consultation with the Contempt Litigation Branch and/or the collections unit of the U.S. Attorney's Office for the relevant district.

1. If necessary, the Region should conduct appropriate investigation to learn what assets the respondent has available from which the judgment may be satisfied. Compulsory discovery is not necessary if information can be obtained through voluntary cooperation of respondents or others. Discovery can be undertaken under Fed.R.Civ.P. 69(a), against parties and nonparties (such as customers, suppliers, accountants, and financial institutions) alike.[130] In some cases, however, the notice requirement of Rules 30(b) (depositions) and 45(b) (production of documents by nonparty), if followed, will compromise any necessary confidentiality. In these situations, the Region, where otherwise appropriate (see Compliance Manual sec. 10590.2), should proceed via Section 11 subpoenas, for which notice to the respondent is not required.[131]

   One caveat should be noted: The Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (RFPA), prohibits the Government from obtaining, from a ''financial institution,'' ''financial records'' of a ''customer'' unless certain prior notification procedures are followed or unless certain exceptions apply. A ''customer'' is defined as an individual or a partnership of five or fewer individuals. Because a corporation clearly is not a ''customer,'' the strictures of the RFPA do not apply to attempts to obtain financial information regarding it.[132] Similarly, the notice requirements of the RFPA are not applicable to a subpoena under Fed.R.Civ.P. 69 and 45, where the ''customer'' whose records are being sought is a named respondent (12 U.S.C. § 3413(e)); this is so because any need for notice to the respondent is satisfied by the notice requirement of Rule 45(b). Accordingly, the RFPA is applicable only if the Region wishes to obtain, from a financial institution, financial records of: (1) an individual or small partnership that is not a named respondent; or (2) an individual or

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[130] No accountant's privilege is recognized under Federal law. See *U.S. v. Arthur Young & Co.*, 465 U.S. 805 (1984).

[131] *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).

[132] This would be the case even if the respondent corporation no longer exists. Thus, the RFPA's definition of ''customer,'' with respect to a given account, is ''any person or authorized representative of that person in relation to an account *maintained in the person's name* [emphasis added].'' See *Duncan v. Belcher*, 813 F.2d 1335 (4th Cir. 1987); *Ridgeley v. Merchants State Bank*, 699 F.Supp. 100, 102 (N.D. Tex. 1988) (''the Act protects *individuals* in whose name the financial account is held'') [emphasis in original].

small partnership that is a named respondent, in situations where the Region does not wish to use a Rule 45 subpoena.[133]

2. Once the Region has located assets from which the judgment can be satisfied, it should proceed, unless circumstances indicate otherwise [for example, when the respondent is in bankruptcy (see Compliance Manual sec. 10610), or where the respondent's financial condition is so perilous that collection actions would *reduce* the chance of obtaining any significant recovery], to invoke one or more of the postjudgment remedies available under 28 U.S.C. §§ 3203–3205. These are execution (§ 3203), an installment payment order (§ 3204), and garnishment (§ 3205). These remedies are summarized below:

A. In an execution (§ 3203) the court directs the United States Marshal to seize and sell real or personal property belonging to the debtor, and to pay the net, nonexempt proceeds (after deducting expenses) to the Government.

B. In an installment payment order (§ 3204), the court directs the debtor to make specified periodic payments to the Government. It is considered particularly useful where the debtor is a self-employed individual or one who manipulates corporate or family assets to pay personal expenses.

C. In a garnishment (§ 3205), the court directs a third party having possession, custody, or control of property of the debtor to pay it to the Government. A writ of garnishment, properly issued and served on the garnishee (the person holding the property) immediately freezes the assets owed by the garnishee to the debtor. This remedy is used, for example, to obtain respondent's funds held in financial accounts, or rents or other receivables owing to the respondent. A garnishment action cannot be commenced until at least 30 days after payment has been demanded from the respondent.

Note: It must be kept in mind that any transfer of funds from a respondent within 90 days before it files a bankruptcy petition can, in certain circumstances, be voided and required to be returned to it under § 547 of the Bankruptcy Code.

3. In the event that the Region is unable to locate assets from which the judgment can be satisfied through collection proceedings, or where

[133] The RFPA contains a ''delayed notification'' provision, 12 U.S.C. § 3409, by which the Government can ask a district court to permit withholding of notice to the customer for a renewable 90-day period under exigent circumstances. The Region should consult with the Contempt Litigation Branch regarding the availability and use of this provision.

circumstances otherwise indicate, the Region should fully investigate all potential theories of derivative liability, such as single employer, alter ego, *Golden State* (414 U.S. 168 (1973)) successor, fraudulent conveyance, and piercing of the corporate veil, using the techniques described above in paragraph 1. As in other contexts, the Contempt Branch is available for advice and assistance, and telephonic inquiries are encouraged. The results of such investigation will determine whether further proceedings—administrative, collection, or contempt—are warranted, or whether, alternatively, the case should be closed without compliance.

10594 Prejudgment Protection From Sale, Transfer, Dissipation, or Fraudulent Conveyance of Respondent's Assets

When financial liability is asserted and there is reason to believe the Board's ability to collect may become impaired for any cause, steps should be taken before entry of a judgment liquidating backpay to protect the Agency's claim. See Compliance Manual section 10600.2 for a list of such triggering actions. See section 10593 regarding postjudgment procedures. These prejudgment steps include the following:

10594.1 Investigation: The Region should take all necessary steps, consistent with the need for prompt judicial relief, to determine whether the respondent is engaging in actions for the purpose, or with the foreseeable effect, of impairing the Board's ultimate ability to collect. The investigation may be directed not only at the respondent, but also at any third parties that may have relevant evidence. See Compliance Manual sections 10590.2 and 10593.6, as well as section 10600, regarding investigation of assets and ability to pay.

10594.2 Injunctive Relief; Protective Restraining Orders: Following a determination to issue a complaint and periodically thereafter, the Region should assess the likelihood of the respondent's rendering itself or otherwise becoming incapable of complying with the monetary provisions of an eventual Board order or court judgment. See Compliance Manual section 10600.2. The respondent's financial condition should be closely monitored, particularly in those cases involving previous use of alter egos or other manipulations of corporate form to evade liability; cases involving a number of closely held corporations controlled by the same party; or cases involving threats to cease or relocate operations in response to organizing campaigns, union demands for recognition, investigative inquiries, or litigation. When it appears that a respondent may be in the process of

rendering itself incapable of complying with the monetary provisions of an existing or potential Board order or court judgment, or is otherwise attempting to render such provisions ineffective, the Region should, after appropriate investigation, recommend that injunctive relief be sought against such conduct pursuant to Section 10(e) or (j) of the Act. The following factors should be considered.

a. Availability of relief: Injunctive relief against dissipation of assets or similar conduct is available at any stage of a case following issuance of an unfair labor practice complaint. Generally, relief is appropriately sought under Section 10(j) from issuance of a complaint to issuance of a Board order; thereafter, relief is appropriately sought under Section 10(e).[134] Depending on circumstances, available relief includes: ''asset freezes,'' limiting the use of the respondent's assets to specified purposes;[135] injunctions against specific transactions or types of transactions; as well as other, less intrusive, forms of relief such as monitoring and reporting requirements.[136]

   In addition, the Federal Debt Collection Procedures Act of 1990, PL 101-647, Title XXXVI, 28 U.S.C. § 3001 et seq. (FDCPA) (see Compliance Manual sec. 10593.1) includes provisions for prejudgment relief, at 28 U.S.C. § 3101 et seq.

b. Criteria for seeking injunctive relief; consideration of alternative strategies for protecting claims: Generally, whenever there exists reasonable cause to believe that a respondent is attempting to evade existing or potential backpay liability, and injunctive relief would preserve the status quo and permit effectuation of meaningful relief, it would be appropriate to recommend that injunctive relief be sought.[137] Examples of appropriate circumstances for seeking relief would include: sales, auctions, closings, foreclosures, or liquidations of a respondent's business that are undertaken without provision for satisfying potential monetary liability under the Act; actual or potential distributions of

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[134] *Maram v. Alle Arecibo Corp.*, 110 LRRM 2495 (D.P.R. 1982) (Sec. 10(j)); *NLRB v. Kellburn Mfg. Co.*, 149 F.2d 686 (2d Cir. 1945) (Sec. 10(e)).

[135] ''Asset freezes'' are typically tailored to minimize interference with a respondent's legitimate operations, and generally permit unfettered use of assets once the respondent provides security, usually in the form of a bond or escrow account, for its extant or potential liability. *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1351 (2d Cir. 1974), cert. denied 417 U.S. 932 (1974); *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1106 (2d Cir. 1972).

[136] See generally *Mitchell v. DeMaria Jewelry Co.*, 361 U.S. 288, 291–292 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397–398 (1946); and *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287–290 (1940).

[137] *Maram v. Alle Arecibo Corp.*, supra at fn. 1 (Sec. 10(j)); *Auto Workers (Ex-Cell-O Corp.) v. NLRB*, 449 F.2d 1046, 1050–1051 (D.C. Cir. 1971) (Sec. 10(e)).

the respondent's assets to its principals or insiders; asset transactions between a respondent and affiliated businesses or relatives, friends, or close business associates of the respondent's officers or principals; or any other circumstances suggesting the possibility of fraud or deliberate measures designed to render a respondent judgment-proof, or unable to comply.

Injunctive relief generally is either inappropriate or of limited utility in cases involving assets already in custodia legis (in the control of the court) such as bankruptcy, probate, or receivership cases. Furthermore, injunctive relief not ancillary to contempt may be inappropriate in cases where the respondent's assets have already ''disappeared.'' In these latter circumstances, the Region should consider the potential effectiveness of contempt, or supplementary administrative proceedings against derivatively liable persons, or proceedings to set aside fraudulent conveyances.[138]

Special considerations apply in bankruptcy because of the ''automatic stay'' provisions of the Bankruptcy Code (11 U.S.C. § 362). Nonbankruptcy injunctive relief relating to a bankrupt respondent's use of its assets is generally inappropriate because of the stay. However, at least in cases when ongoing financial misconduct of a debtor's management threatens to frustrate compliance, limited injunctive relief to freeze assets of the debtor with a receiver or court appointed officer may be ''excepted'' from the stay and therefore appropriate.[139] Moreover, the automatic stay applies only to actions taken against the debtor; generally speaking, therefore, actions against nonbankrupt co-respondents or third parties are not automatically stayed. The Special Litigation Branch should be consulted for guidance or assistance in this area.

In assessing the appropriateness of recommending injunctive relief, it should be recognized that injunctive relief is more likely to ensure

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[138] *NLRB v. C.C.C. Associates*, 306 F.2d 534, 539–540 (2d Cir. 1962) (use of supplementary administrative proceedings, including investigative subpoenas, to establish derivative liability of corporate principals); *Concrete Mfg. Co.*, 262 NLRB 727, 727–729 (1982) (use of supplementary proceedings after liquidation of backpay to determine derivative liability); *U.S. v. Neidorf*, 522 F.2d 916, 917–920 (9th Cir. 1975), cert. denied 423 U.S. 1087 (suit against fraudulent transferees of corporate assets); *In re Kaiser*, 722 F.2d 1574, 1582–1583 (2d Cir. 1983) (attack on fraudulent bankruptcy).

[139] The stay excepts from its operation certain exercises of ''police and regulatory power'' (11 U.S.C. § 362(b)(4) and (5)). These exceptions permit nonbankruptcy injunctive relief that affects a debtor's assets in some cases. See *CFTC v. CoPetro Marketing Group*, 700 F.2d 1279, 1283–1284 (9th Cir. 1983); *SEC v. First Financial Group of Texas*, 645 F.2d 429, 437–440 (5th Cir. 1981); *FTC v. R. A. Walker & Associates*, 37 B.R. 608, 610–612 (D.D.C. 1983).

prompt success in achieving ultimate compliance than most postjudgment measures.

c. Directing the recommendation: Recommendations for protective order injunctive relief should be promptly submitted, as indicated below, with a copy to Division of Operations-Management:

1. From issuance of complaint to issuance of Board order: Division of Advice (Associate General Counsel and Assistant General Counsel, Injunction Litigation Branch).

2. From issuance of Board order to issuance of court judgment: Division of Enforcement Litigation, Appellate Court Branch (Deputy Associate General Counsel).

3. After issuance of a court judgment: Division of Enforcement Litigation, Contempt Litigation Branch (Assistant General Counsel).

4. A special problem arises when a Board order or court judgment has issued against a respondent, but interim relief appears to be warranted against one or more previously unnamed third parties, as to whom liability could be determined in either a supplemental administrative proceeding or in a contempt proceeding. In this situation, the Region should submit its recommendation to all of the above branches with a recommendation that they consult as to the appropriate course of action.

d. Form and content of recommendation: As time is of the essence, the appropriate branch or division should be advised telephonically that a recommendation is forthcoming. Generally, the respondent should not be given advance notice of the Region's intention to make such a recommendation because of the limited deterrent value of such notification and because experience indicates that notification may impede the Board's ability to obtain relief, for example, by causing a respondent to accelerate its evasive conduct or by compromising confidential sources. The recommendation should be submitted as expeditiously as possible and include the following:

1. A description of the status of the case, including citations to any reported Board or court decisions or the docket numbers, dates of issuance, and copies of any unreported decisions.

2. A narrative outline of the conduct giving rise to the recommendation, based on as thorough an investigation as time permits.

3. Any relevant exhibits or available affidavits[140] of witnesses, including Regional personnel if based on firsthand knowledge; the names, addresses, and telephone numbers of sources utilized in the Region's investigation of the conduct.

4. The name, address, and telephone number of the respondent's counsel and, if appropriate, the names, addresses, and telephone numbers of other parties to any transaction or potential transaction involved in the recommendation, or those of their counsel, if known.

5. An affidavit of the compliance officer setting out an estimate of the respondent's current backpay liability, including accumulated interest.

e. Regional role during pendency of injunctive proceedings: Any requests by Washington for further investigation by the Region, either prior to initiating or during litigation, should be handled expeditiously. Respondents who are subject to injunctive proceedings may resist cooperation with the Board. Thus, the Region should not presume that any respondent will respect the pendency of injunction proceedings, or the issuance of an injunction itself, by refraining from evasive conduct. Accordingly, the Region should thoroughly monitor the respondent to ensure that it does not take further steps to evade compliance.

Following issuance of the injunction, the Region should closely monitor the respondent's compliance with all injunctive provisions, particularly those requiring disclosure of information to the Region, turnover of documents, or establishment of escrow accounts or other forms of security. Such monitoring may include requests to third parties for appropriate information; subpoenas may be served on recalcitrant third parties.[141] The Regions should promptly report any failure or refusal to comply with any provision to the appropriate Washington

[140] Under 28 U.S.C. § 1746, an unsworn declaration, made under penalty of perjury in the form prescribed in that statute, may be used in any Federal court proceeding in lieu of a sworn affidavit. References to affidavits herein shall include such declarations.

[141] If an injunction has been issued and contains a discovery provision, discovery may be had thereunder. In any event, investigation may be conducted by Sec. 11 subpoena. See Compliance Manual secs. 10601.1 and 10590.2 regarding investigative subpoenas.

office with a recommendation that contempt be sought, supported by proof of noncompliance. Noncomplying respondents should be warned in writing of the potential sanctions for failure to comply, including contempt, and the precise respects in which the Region believes the respondent has failed to comply.

10594.3 Notice and Constructive Notice to Third Parties: Notice of Board and related proceedings should be given to all third parties actually or potentially involved in any significant asset transaction with a respondent, inasmuch as derivative liability against third parties unrelated to the respondent may depend on their having ''actual notice.''[142] Similarly, *Golden State* successorship liability[143] and, of equal practical importance, an acquiring entity's ability to arrange with the original Respondent for indemnification for such liability, also may turn on notice of the dispute. See Compliance Manual section 10592.8. Accordingly, in any case in which it appears that actual or potential third parties are or may be engaging in significant asset transactions with a respondent, the following procedures should be followed:

a. Service of pleadings; advisory letters: On learning of the involvement of a third party in a current or potential transaction with a respondent that may impair the Board's ability to obtain compliance, the Region should ordinarily serve the third party with copies of the pleadings in the case (particularly the complaint or compliance specification and any decisions), as well as of any restraining order(s) in effect, together with a letter setting forth, briefly and in an impartial and nonadversarial manner, the reason(s) for service and a short statement of the third party's potential exposure, such as the amount or estimated amount of backpay due. Service should be by certified mail, return receipt requested, or by some other method that permits verification of delivery, including by a Board agent.[144]

The intent of the letter should not be to impair the transaction, but rather to give notice of the pending proceedings, and of the requirements of any extant restraining order—e.g., that funds not be paid over to respondent—and of the recipient's potential liability for violating such an order. Care should be taken not to state or imply that the recipient will be held to be a successor, but rather to put the

[142] See and compare, Fed.R.Civ.P. 65(d), under which injunctions are binding ''upon the parties to the action, their officers, agents, servants, employees, and attorneys,'' without regard to notice.

[143] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184–185 (1973).

[144] If time is of the essence, the material, or at least the essential portions of it, should be served by fax if possible.

party on notice of pending proceedings and, if applicable, of the existence and requirements of any extant restraining order. See Compliance Manual section 10592.8 for notice in contempt cases. A sample letter is found in Appendix 5.

If the Region believes that, because of unusual circumstances, notice should not be given, it should seek clearance from the Contempt Litigation Branch, with a copy to the Division of Operations-Management. If the respondent is in bankruptcy, clearance should be sought from the Special Litigation Branch.

The Region should continue to serve such documents, notwithstanding a third party's claim of lack of relationship to the respondent. Threats by the respondent or a third party to initiate litigation against the Board or its representatives on the basis of such notice, for example, a threat to initiate a suit based on tortious interference with contractual advantage or to seek from a bankruptcy court an order approving a free-and-clear sale, should be referred to the Special Litigation Branch, with a copy to the Division of Operations-Management. In the absence of contrary instructions, however, such threats should not deter efforts to make or continue such service of such notice(s).[145]

b. Use of lis pendens, notice of pendency, notice of interest, or similar devices for giving constructive notice, in cases involving real or personal property:

1. In cases involving proceedings against particular property: When an action seeking relief relating to a respondent's disposition of real property has been filed, the Region should, if state law permits, docket a notice of the pendency of such proceedings against the property involved. Generally, such notices are permissible only where there is an action pending that affects title to the property.[146]

Under 28 U.S.C. § 1964, it is incumbent on parties litigating in Federal district courts to comply with the requirements of state law authorizing such notice (with the significant exception that agencies of the United States are exempted from bonding requirements by 28 U.S.C. § 2408). Regions should therefore

[145] See Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., 2680(h).

[146] See 51 Am.Jur.2d *Lis Pendens* § 21 (1970); *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1319–1321 (3d Cir. 1982); *Cayuga Indian Nation v. Fox*, 544 F.Supp. 542, 547–548 (N.D.N.Y. 1982).

thoroughly familiarize themselves with lis pendens laws in all states within their respective jurisdictions, determine the requirements for filing such a notice, and seek clearance from the Division that is processing the injunctive proceedings prior to filing or recording such notice.

A notice of pendency, when permissible by law, serves as constructive notice to all subsequent purchasers and encumbrancers of the property, thereby tending for practical reasons to protect the status quo during litigation and limit a respondent's ability to dispose of real property to bona fide purchasers. In addition, a notice of pendency may, in some States, be the only way to register an injunction.

Some jurisdictions also permit such notice to be utilized in actions affecting certain types of personal property; however, such notice is, like that applying to real property, inappropriate unless the litigation involved seeks to reach specific personal assets.[147] Where available, the use of such notice relative to personal property is subject to the same instructions as set forth above concerning real property.

2. As noted above, in section 10594.2(a), the FDCPA contains provisions for obtaining prejudgment relief, including prejudgment attachment. Under 28 U.S.C. § 3102(f), such attachment will create a lien in favor of the United States upon levy on the property pursuant to a writ of attachment. The Region should consult with the Contempt Litigation Branch or the Injunction Litigation Branch, as appropriate, regarding the availability and use of prejudgment attachment. (See Compliance Manual sec. 10594.2(c).)

10594.4 Recording Unliquidated Judgments or Board Orders: The proceedings discussed above are generally required to protect Board monetary claims in the absence of a supplemental judgment liquidating backpay. If permitted by state statute, however, the Region may record unliquidated judgments or Board orders under applicable state law, which, at the very least, may provide notice to third parties who may have potential derivative liability.

[147] See generally 51 Am.Jur.2d *Lis Pendens* (1970).

10594.5 Certification of Checks; Cashier's Checks: In any case where the Region believes it appropriate to do so, the respondent may be instructed to pay by certified or cashier's check.

10596 Derivative Liability

10596.1 Derivative Liability Defined: As used in this manual, ''derivative liability'' refers to the liability for remedying a violation of the Act that may be imposed on a person (as defined by Sec. 2(1) of the Act) other than the one that committed the unfair labor practice.

10596.2 Forms of Business Organization: Business activities generally are organized as proprietorships, partnerships, and corporations. Labor organizations technically are unincorporated associations, but for purposes of liability may be treated as corporations. A cardinal principle of American corporate law is the concept of ''limited liability,'' under which shareholders are not liable for the debts of the corporation. In the case of a sole proprietorship or partnership, however, the proprietor or the partners are legally indistinguishable from the business entity; accordingly, the business' remedial obligations, including the obligation to pay backpay, may be imposed on the proprietor or partners directly, without resort to principles of derivative liability. It is important that the Region, before issuing a complaint or a compliance specification, identify the respondent's business form and proceed accordingly. If the business is a sole proprietorship, the complaint or compliance specification should name the individual proprietor as respondent; if it is a partnership, the complaint should name the partners.

10596.3 Others Who May be Responsible: Other persons (as defined by Sec. 2(1)) may stand in such a relation to the person committing the unfair labor practice that they too may be held responsible for remedying the violation—that is, they may be ''derivatively liable.'' Various theories of derivative liability are applied under the Act:

a. A nominally distinct entity may be liable as an alter ego or disguised continuance of the person committing the unfair labor practice.

b. The person committing the unfair labor practice may be part of an affiliated group of business entities which constitute a single employer for purposes of the Act. A finding of single employer

will permit the imposition of certain remedial obligations on the affiliates, including liability for backpay.

c. Where the respondent's operations are the subject of a bona fide transfer to new ownership and the business continues in substantially unchanged form, certain remedial obligations may be imposed on the acquiring entity as a *Golden State* successor, if it can be shown that the transferee acquired the business with knowledge of unremedied unfair labor practices.

d. In cases involving a corporate respondent, the Board and the courts will occasionally pierce the corporate veil and hold corporate shareholders derivatively liable for unfair labor practices. Generally speaking, the corporate fiction will be disregarded if its observance would produce injustice or inequitable consequences—for example, where the corporate device is used to perpetrate fraud or evade statutory obligations, or where the corporate principals have intermingled their personal and corporate assets and affairs to the detriment of creditors, or have used the corporation as a mere ''shell'' to advance their own purely personal rather than corporate ends.

e. A corollary of the doctrine of piercing the corporate veil is the direct participation theory of intercorporate liability, which holds that ''when a parent corporation disregards the separate legal personality of its subsidiary (and the subsidiary's own decision-making 'paraphernalia') and exercises direct control over a specific transaction, derivative liability for the subsidiary's unfair labor practices will be imposed on the parent.''[148]

f. Rule 65(d): The language of Board orders binding ''officers, agents, successors and assigns'' is understood to be coextensive with the reach of Fed.R.Civ.P. 65(d), which provides that injunctions are binding on ''the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order.'' Thus, for example, an officer of a corporation who fails to cause a corporation to comply with an order to pay backpay is prima facie liable in contempt, and may be held liable at least to the extent that the corporation was capable of

[148] *American Electric Power Co.*, 302 NLRB 1021, 1023 (1991), enfd. mem. 976 F.2d 1025 (4th Cir. 1992).

paying. Similarly, an owner/officer who, following entry of an unliquidated make-whole order, takes steps to disable the corporation from complying, would be individually liable. In addition, a third party such as a customer or supplier may be held liable as ''person in active concert or participation'' if it, with knowledge of the judgment, shifted its business dealings from the named respondent to an alter ego.

g. Fraudulent transfer: If a named respondent gratuitously transfers an asset during the pendency (or in anticipation) of litigation, the transfer may be fraudulent under the version of the Uniform Fraudulent Transfer Act applicable in the State where the violation occurred and/or the fraudulent transfer provisions of the Federal Debt Collection Procedures Act, 28 U.S.C. § 3304. If so, the person to whom the asset was transferred can be named as a respondent, and a return of the asset (or its dollar equivalent) sought as an administrative remedy. Whether such a transfer can be set aside typically depends on such factors as when the transfer was made vis-a-vis the litigation, to whom it was made, whether the debtor received value for the transfer, and whether the debtor knew or should have known that its assets would be insufficient to satisfy a potential future debt.

10596.4 Alternate Theories: It is important to remember that there is considerable overlap among the legal theories identified above, and that alternative theories of derivative liability often should be alleged and litigated in a single proceeding.

10596.5 Identifying Remedial Objective and Appropriate Theory: Different legal consequences may flow from application of the various theories of derivative liability. It is therefore important to determine, as an initial matter, what the remedial objective is, and then to ensure that the proper theory or theories are pled and factually supported.

10596.6 Applicable Circuit Court Law: When drafting pleadings and formulating litigation strategy in a particular case, attention should also be paid the law of the circuit in which the Board's order is likely to be reviewed. The derivative liability caselaw in certain circuits may contain formulations of a legal standard that differ to some degree from the Board's formulation. Pleadings should be prepared, and a record developed at hearing, with an eye to satisfying both Board and circuit formulations of the applicable theories of derivative liability.